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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 454.

CLAIBORNE-ANNAPOLIS FERRY COMPANY,
Appellant,

versus

UNITED STATES, ET AL.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

PETITION OF THE STATE OF MARYLAND AND BRIEF AS AMICUS CURIAE.

WILLIAM PRESTON LANE, JR.,
Attorney General,

WILLIS R. JONES,
Deputy Attorney General,

G. C. A. ANDERSON,
Assistant Attorney General,

For the STATE OF MARYLAND,
Amicus Curiae.

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ON APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

PETITION OF THE STATE OF MARYLAND FOR PERMISSION TO FILE A BRIEF AS AMICUS CURIAE.

To the Honorable, the Justices of the Supreme Court of the United States:

Now comes the State of Maryland, by its Attorney General, and respectfully shows unto Your Honors:

I. That the above entitled cause involves the valdiity of an order passed by the Interstate Commerce Commission.

II. That the order complained of authorizes the Chesapeake Beach Railway Company to establish and operate a general or vehicular ferry service from point to point within the State of Maryland, namely, across Chesapeake Bay, from Chesapeake Beach, Calvert County, Maryland, to Seward's farm, Trippe's Bay, Dorchester County, Maryland.

III. That the Chesapeake Beach Railway Company applied to the Interstate Commerce Commission for authority to extend its line of railroad across Chesapeake Bay by ferry, but it appears from the record that the Railway Company does not now, and will not in the future, have railroad business—either passenger or freight—to be transported across Chesapeake Bay, and that its sole purpose, in making the application, is to promote a general or vehicular ferry service.

IV. That the effect of the order is to enable the Chesapeake Beach Railway Company to evade and ignore the jurisdiction of the State of Maryland over ferries within its borders.

V. That, if the Chesapeake Beach Railway may establish and operate an intrastate service under the guise of complying with Sec. I, par. 18 of the Interstate Commerce Act, as amended, other ferries across the Chesapeake Bay and other waters of State will be enabled to evade and ignore the jurisdiction of the State of Maryland, and its control and supervision over this class of common carriers within the State will be broken down and destroyed.

VI. That the State of Maryland has a vital interest in the case, and contends that its rights and sovereignty

are invaded by the order of the Interstate Commerce Commission.

WHEREFORE, the State of Maryland respectfully prays leave to file a brief in this proceeding as *amicus curiae*.

Respectfully submitted,

THE STATE OF MARYLAND,

By WILLIAM PRESTON LANE, JR.,
Attorney General,

WILLIS R. JONES,
Deputy Attorney General,

G. C. A. ANDERSON,
Assistant Attorney General.

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OCTOBER TERM, 1931.

No. 454.

CLAIBORNE-ANNAPOLIS FERRY COMPANY,
Appellant,

versus

THE UNITED STATES OF AMERICA, CHESAPEAKE BEACH RAILWAY COMPANY, AND INTERSTATE COMMERCE COMMISSION,
Appellees.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF FOR STATE OF MARYLAND, AMICUS CURIAE.

Question Presented.

The sole question in which the State of Maryland is interested is whether the Interstate Commerce Commission, under the guise of regulating interstate commerce, may deprive the State of its jurisdiction over ferries operating from point to point within its boundaries, in the absence of evidence, or substantial evidence, that public convenience and necessity require interstate service.

ARGUMENT.

It must be conceded, on this record, that evidence of public convenience and necessity for the extension of the Chesapeake Beach Railway line by ferry across Chesapeake Bay is negligible, and that the "primary purpose," in the language of the Commission—and, indeed, the sole purpose—is the operation of a general ferry service from Chesapeake Beach, on the Western Shore, to Trippe's Bay, on the Eastern Shore.

The report and order of the Interstate Commerce Commission, dated August 1, 1930, embrace a discussion of the advantages of a *general ferry service* across Chesapeake Bay at the points designated in the application, a discussion plainly irrelevant if the Commission was simply making a finding based on the alleged need of the extension of a railroad line. On September 2, 1930, the intervener, The Claiborne-Annapolis Ferry Company, petitioned the Interstate Commerce Commission to modify its report, order and certificate so as to make it clear that the Commission was acting within the statute, and not attempting to authorize an intrastate service (R., pp. 169-171). On September 5, 1930, the Chesapeake Beach Railway Company, the applicant, filed a reply opposing the petition for modification, stating that the matter

> "was tried upon the theory that the application was one for the extension of applicant's line by the establishment of a ferry which, in addition to handling interstate traffic, *would also handle intrastate traffic, consisting of the transportation of automobiles and other vehicles with their passengers.* This was the only possible ground which the intervenor would have for opposing the application * * *" (R., pp. 172, 173).

The applicant went on to point out that the Examiner of the Interstate Commerce Commission, upon consideration of the evidence, recommended the certificate for the service *"as proposed by the applicant"* (R., p. 173).

The applicant also emphasized the fact that the Claiborne-Annapolis Ferry Company had filed exceptions to the Examiner's report on the ground that the Interstate Commerce Commission is not authorized by law to grant a certificate for a general ferry service wholly within a State, and pointed out that the Commission had overruled the exceptions, claiming to have jurisdiction (R., pp. 173, 174).

After the applicant had thus argued against the petition, the Interstate Commerce Commission, on October 13, 1930, denied it, adopting the applicant's views with respect to it (R., p. 177).

On October 14, 1930, the Chairman of the Maryland Public Service Commission addressed a protest to the Interstate Commerce Commission, saying that "But if it is proposed to operate a ferry between two points in Maryland and carry passengers, freight and automobiles in an intrastate traffic which has no connection with the interstate business of the company, then this Commission feels that the Interstate Commerce Commission has no authority to grant permission for such an operation * * *" (R., p. 179).

No action was taken upon this protest.

With this record before it, the learned trial court held that "The Ferry Company, in the argument, construed the order as authorizing the Railway to conduct a general ferry business separate and distinct from its railway

business* * * but we do not think we need pass upon this question or determine in this proceeding whether the certificate of convenience issued by the Commission has that effect or not * * *" (R., p. 47).

In this case, therefore, the situation is that the applicant, while pretending to seek permission to extend its railroad line, under the Interstate Commerce Act, based its application almost entirely on evidence of the alleged need for a general ferry, unconnected with the railroad operation. It admits that it endeavored to get permission from the Federal body to conduct an intrastate service. The Examiner recommended that the Commission grant authority for the service "as proposed by the applicant," and the Commission approved the recommendation and overruled all objections that it exceeded its powers.

The three-judge court below declined to rule on the question, raised first before the Interstate Commerce Commission and again before it, saying "The Ferry Company may not, as we think, for any reason shown on the record, annul the certificate or avoid its effect, *whatever that may be.*" (Italics ours).

We submit that there is no good reason why the parties to this proceeding and the State of Maryland should be left to speculate further as to the effect of the Commission's order. If this Court believes that there is sufficient evidence in the record to show public convenience and necessity for the extension of the rail line by ferry across Chesapeake Bay, then all that is left to be decided is whether the Commission limited its order to the subject-matter over which the Congress gave it jurisdiction; or whether the effect of the order is to authorize a general ferry service wholly within a State.

Sec. 1, Par. 2 of the Transportation Act provides that it shall not apply to the transportation of passengers and property wholly within one State.

The distinction between a railroad ferry and a general ferry has often been made by the courts.

St. Clair Co. vs. Interstate Transfer Co., 192 U. S. 454, 466-467.
Golden Gate Ferry Co. vs. Railroad Com., 204 Cal. 305.
Fitch vs. New Haven, etc., 30 Conn. 38.
The Maverick, 16 Fed. Cas. (No. 9316) 1186.
Chesapeake Ferry Co. vs. Hampton Roads, 133 S. E. (Va.) 561.

It is unnecessary, in this brief, to detail the other circumstances, such as the approval by the Commission of plans for large expenditures, amounting to $700,000, for two ferry boats, each designed to carry 95 automobiles and 1,800 passengers, indicating conclusively that the proposed operation is what the Railway admits it is—a general or vehicular ferry service. But these facts do furnish urgent reasons why this Court should not leave the question of the powers of the Commission, or of the extent of the franchise granted, to some other and later proceeding, after large sums have been expended, perhaps uselessly, and much damage has been done to the carriers affected.

It is argued that *Colorado vs. United States*, 271 U. S. 153, and *Transit Commission vs. United States*, No. 498, decided January 4, 1932, are authority for the proposition that, in passing upon an application for an extension of railroad, the Commission is empowered to con-

sider the transportation needs of the community to be served, and that "it is therefore immaterial that in this case a very large part of the ferry revenue will be from traffic which does not also pass over the existing railroad line."

Brief for the United States and The Interstate Commerce Commission, p. 23.

We submit that these cases cannot be twisted into the approval of an application for an extension (by ferry) under which *all* the estimates of ferry revenue are based on traffic (vehicles and their passengers) *no part of which passes over the existing railroad line;* nor into an approval of an admitted attempt to establish an intrastate service without the permission of the State. (The applicant here even claims that the State is estopped from objecting. R., p. 176).

The ferries in Maryland, as elsewhere, are part of the highway system. Those now in operation, from one State road to another, are subsidized on the basis of annual maintenance cost per mile. The applicant regards the proposed ferry, not as a railroad extension, but as part of the Maryland highway system, and has announced its intention of seeking a subsidy amounting to $16,000 annually (R., p. 132).

The State has a vital interest, not only because of the annual subsidies it provides, but also in promoting the operation of ferries where most advantageous for the transportation of passengers and vehicles, so that the convenience and business needs of its people may be served. It has granted franchises where it appeared desirable, taking care that new services did not unduly

hamper or interfere with the usefulness of those already in existence. The State, through its authorized agencies, is, of course, in a better position than any outside agency to judge of the necessities of traffic on its highways within its borders, and to determine upon the responsibility of those who seek franchises, their ability to provide the promised service, and the effect, if any, upon the utilities already exercising franchises.

The Chesapeake Beach Railway Company seeks to establish a ferry service within the State of Maryland without a certificate from the Public Service Commission of Maryland. Its method is to appear to follow the Interstate Commerce Act, but, in substance, its action is an attempted evasion of the authority of the State. If it succeeds, other ferries, hiding under the cloak of "railway extensions" may escape the authority of the State, and impair and destroy services built up and maintained in the public interest after many years of effort. What is done in Maryland may, of course, be duplicated in other States, and State authority over its highways and ferries broken down for all-time. Certainly no such result was contemplated when this Court held in *St. Clair Co. vs. Interstate Transfer Co., supra,* that a railroad ferry was not a general ferry. It is a far cry from that decision to the instant case, where an effort is made to have the Interstate Commerce Commission and the courts hold that a general ferry is a railroad ferry.

CONCLUSION.

We submit that the decree of the trial court should be reversed, and that the order and certificate of the Interstate Commerce Commission, attempting to grant author-

ty to establish a general ferry within the State of Maryland, be declared nugatory, null and void.

Rsepectfully submitted,

WM. PRESTON LANE, JR.,
Attorney General,

WILLIS R. JONES,
Deputy Attorney General,

G. C. A. ANDERSON,
Assistant Attorney General,
For the STATE OF MARYLAND,
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